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IN THE

Supreme Court of the United States

October Term, 1962

No. 655

PACIFIC QUEEN FISHERIES, *et al.*,
Petitioners,

vs.

L. SYMES, *et al.*,
Respondents.

PACIFIC QUEEN FISHERIES, *et al.*,
Petitioners,

vs.

ATLAS ASSURANCE COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Pacific Queen Fisheries, *et al.*, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in the above cases on August 3, 1962.

Opinions Below

The oral opinion of the United States District Court for the Western District of Washington (Southern Division) on the facts (R. 227-248) has not been officially or unofficially reported. The oral opinion of the District Court on the law (R. 290-295) also has not been officially or unofficially reported. The District Court's Findings of Fact (R. 249-278, 1051-1093) and Conclusions of Law (R. 279-287) are unofficially reported at 1962 Am. Mar. Cas. 574-600. The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 307 F. 2d 700-721 and unofficially reported at 1962 Am. Mar. Cas. 1845-1870. Extensive portions of the District Court's Findings of Fact are printed in footnotes 10, 13, 17 and 19 to the Court of Appeals opinion officially reported at 307 F. 2d 700-721 and these footnotes have been excluded from the reprinting of the Court of Appeals opinion in the Appendix hereto as the pertinent material appears printed in full in the Record (R. 249-278).

Jurisdiction

The judgments of the Court of Appeals for the Ninth Circuit sought to be reviewed were filed and entered on August 3, 1962 and copies thereof are appended to this petition in the Appendix at pages 32a-33a. The opinion of the Court of Appeals, filed August 3, 1962, was modified by the Court, *sua sponte*, by order dated August 31, 1962. (The opinion is reprinted in the Appendix hereto as modified and is hereinafter sometimes designated as "Op.".) The timely petition of appellants below for rehearing was denied by order of the Court of Appeals dated September 13, 1962. The jurisdiction of the Supreme Court of the United States to review the judgments of the Court of Appeals in question is invoked under 28 U. S. C. §§ 1254(1) and 2101(c).

Questions Presented

Pacific Queen Fisheries, a partnership, owned the diesel fishing vessel PACIFIC QUEEN which became a constructive total loss on September 17, 1957 (R. 198-199) owing to a combination of causes including explosion, fire and sinking (R. 1051). Prior to her loss, Pacific Queen Fisheries, hereinafter sometimes referred to as "Fisheries," obtained insurance insuring PACIFIC QUEEN against loss in the sum of $325,000.00 and each of several gillnet fishing boats carried aboard in the agreed amount of $5,000.00 each (R. 199). Following the loss of the vessel, loss of two of her gillnetters and damage to a third gillnetter, Fisheries furnished respondent insurance underwriters, hereinafter sometimes referred to as "Insurers," proof of the aforementioned losses and abandoned the vessel to Insurers (R. 199). Insurers agreed that the vessel was a constructive total loss, but declined tender of abandonment (R. 199-200). Insurers have not paid to Fisheries any part of the insurance on PACIFIC QUEEN, or on two lost and one damaged gillnetter, although payment has been duly demanded (R. 201).

Insurers raised the following alleged legal defenses, which, according to provisions contained in the insurance contracts (R. 75, 83), must be determined in accordance with English Law and usage, in substantiation of their position that the losses were not covered by the insurance:

1. Fisheries concealed from Insurers circumstances material to the risk.

2. The PACIFIC QUEEN was, with the privity of the assureds, sent to sea in an unseaworthy state.

3. The loss and damage resulted from want of due diligence by the owners of the vessel.

Whether or not any of these defenses may stand, under English law and usage and under all the circumstances of the losses and damage, is the basic question presented by this petition.

Other important questions include:

4. Whether a contractual time bar provision advanced by one of the Insurers, Buffalo Insurance Company, should be given effect.

5. Whether Petitioners herein were rightfully denied a trial by jury.

Constitutional Provision, Statute, Act, and Rules Involved

The pertinent portions of *U. S. Const.* amend. VII; *Fed. R. Civ. P.* 38(d), 39(b) and 81(c); *Revised Code of Washington* § 4.44.100; British *Marine Insurance Act*, 1906, 6 Edw. 7, C. 41, Sections 17, 18, 39(5) and 55(2)(a); are set forth in the Appendix hereto beginning at page 34a.

Statement of the Case

Diversity of citizenship existing, and the amount in controversy exceeding $10,000.00, the District Court had jurisdiction to hear the consolidated cases under the provisions of Sections 1332 and 1441(a) of Title 28, United States Code (Op. 1a). The basic facts, which are not in dispute, are as follows:

Beginning in 1950, Fisheries operated the PACIFIC QUEEN between Puget Sound, Washington and Bristol Bay, Alaska, as a refrigerated vessel to freeze and transport catches of salmon from Alaska to ports on Puget Sound (Op. 2a). After the relaxation of governmental fish conservation measures in 1951, PACIFIC QUEEN carried aboard several gasoline powered fishing boats, known as "gillnetters," whose function it was to catch and transport salmon to the mother ship for freezing (Op. 2a-3a; R. 1054).

During the years beginning 1950, Fisheries insured PACIFIC QUEEN with various insurance companies (Op. 3a[1]). During the month of May, 1955, Fisheries' insurance broker requested United States Salvage Association to make a condition survey of the PACIFIC QUEEN (Op. 3a[1]). The survey was accomplished by one Edward Marquat and his report of survey (Pltffs.' Exh. 16[1]; R. 630) dated May 13, 1955 reads, in part, as follows:

> "Case No. 78-918
> Inspection for
> Insurance Purposes
> May 13, 1955
> D/V 'PACIFIC QUEEN'
>
> • • •
>
> THIS REPORT IS EXCLUSIVELY
> FOR THE USE AND INFORMATION
> OF UNDERWRITERS
>
> • • •
>
> Fuel and Water Capacities:
> Fuel 49,000 gallons
> Water 14,000 "
> Gas 3,000 "
> (Gasoline tanks under deck
> aft, proper filling lines and
> vents to atmosphere)
>
> • • •
>
> Ten 30-foot power seine
> skiffs are nested and lashed to the
> upper deck of this vessel."

The PACIFIC QUEEN did not engage in Alaskan operations in 1956 (Op. 4a[1]). On about May 2, 1957, and prior to the opening of the new king salmon fishing season, Fisheries' insurance brokers again requested United States Salvage Association to make a condiction survey of the PACIFIC QUEEN (Op. 4a[1]). This time the survey was accomplished by one J. E.

[1] Offered, R. 348; received R. 351.

Elkins, an experienced surveyor, and his report of survey (Pltffs.' Exh. 17;[1] R. 631) dated May 3, 1957 reads, in part, as follows:

"Case No. 78-3155
INSPECTION REPORT
COMPOSITE 'PACIFIC QUEEN'

* * *

THIS REPORT IS EXCLUSIVELY FOR THE USE AND INFORMATION OF UNDERWRITERS

* * *

4. Intended Service: Mother ship for salmon gillnet operations.

* * *

24. Other Particulars Not Noted Above: This vessel acts as mother ship to 12 power gillnet boats.

* * *

26. Remarks, Including Existing Damages: Gillnet Boats

Approximately 30' x 8' powered with 4-cylinder gasoline engine. Considerable damage around guards and open seams in hull. Owner has crew of men repairing gillnet boats and same will be in good operating condition before departure for Bristol Bay.

27. Recommendations, and Date Given Owner: May 2, 1957

(1) All weather doors on main deck to have gaskets received and dogs freed up.

(2) Check CO_2 system.

* * *

[1] Offered, R. 348; received R. 351.

> 32. Vessel has been inspected while afloat at Tacoma, Washington and upon compliance with above recommendations, in the opinion of the undersigned, will be in satisfactory condition for operation"

Mr. Galbreath, a vice-president of Marine Office of America which was (and may still be) the marine manager for Glenns Falls Insurance Company, one of the Insurers, *admitted* at the trial that the surveyors were employed by Insurers (R. 778), the survey fees were paid by Insurers (R. 777) and that Insurers required the surveys (R. 790) before passing upon requests for insurance. Mr. Galbreath further *admitted* (R. 780, 783-786) that:

> "We knew if she had—were using these tanks that had been mentioned in previous surveys for gasoline carrying—the purpose of putting the gasoline in those tanks was to fuel her own gillnet vessels."

At some date subsequent to the May 13, 1955 Marquat condition survey, and prior to the attachment of insurance on May 24, 1957, Fisheries increased the gasoline tank capacity of PACIFIC QUEEN from 3,000 to 8,000 gallons and inserted below-deck exposed gasoline discharge valves into fittings that had been designed and used for insertion of permanently secured drainage plugs (Op. 5a). The District Court's finding that these changes materially increased the risk was found by the Court of Appeals not to be "clearly erroneous" (Op. 16a). There is *no* evidence in the record herein (nor has any been alleged by Insurers), however, indicating whether or not these changes were accomplished prior to or subsequent to the Elkins condition survey of May 2, 1957.

On May 27, 1957, the PACIFIC QUEEN departed from Seattle and proceeded to Alaskan waters to engage in fishing (Op. 5a). After she returned from Alaska, she shifted to various Puget Sound docks and was then sent to Friday Harbor, San

Juan Islands, Washington (Op. 5a). On September 9, 1957, while at Friday Harbor, 500 to 600 gallons of gasoline were spilled from one of the vessel's tanks in its hold into the interior of the vessel (Op. 5a-6a). The spillage was reported to one of owners and manager of the vessel (petitioner Mardesich) who inspected the vessel on the day of the spill but who gave no specific orders as to the methods to be used in cleaning her (Op. 6a). The Court of Appeals described the cleaning methods employed by the crew as follows:

> "In an attempt to purge the vessel of gasoline, cold water, sprayed through a hose, was used to wash down the area. After removal of all visible traces of gasoline, the area was again washed down with cold water, and a bilge cleaning solvent was used in an attempt to remove the gasoline from the wooden hull. Portable blowers were used to remove gasoline fumes from the vessel. Then, on the evening of September 10, 1957, the vessel's ventilation blowers were placed into operation to free the vessel from gasoline fumes" (Op. 6a).

On the evening of September 11, 1957, PACIFIC QUEEN departed from Friday Harbor and proceeded to Seattle (Op. 7a). On September 15, 1957, she left Seattle and proceeded to Tacoma where she tied up at "Old Town Dock" at approximately 4:35 P.M. (Op. 7a). At approximately 4:00 A.M. on the morning of September 17, 1957, a violent explosion occurred on board the PACIFIC QUEEN which the Court of Appeals stated could only have been consistent with an explosion of gasoline vapor origin (Op. 7a). As a result of the explosion and fire, the vessel sank at the dock in approximately 30 feet of water (R. 1051) and became a constructive total loss (R. 1081-1082). The source of the explosion's ignition is unknown (Op. 7a). It could have been a spark from a cigarette, or a match, or an electric contact, or other accidental source (Op. 7a).

In the suits arising out of the loss of PACIFIC QUEEN brought by Fisheries against Insurers, the District Court,

sitting without a jury, held Insurers free from liability on the insurance contracts and, from the judgment (R. 288-290) so holding, Fisheries appealed to the Court of Appeals (Op. 7a-8a). The Court of Appeals, for the reasons stated in its opinion, affirmed (Op. 31a) the judgment of the District Court.

ARGUMENT

I

The Court of Appeals decision diverges from English Law and usage.

The courts of the United States, and notably the United States Supreme Court, have expressly announced and followed a policy of deference to the English decisions in the field of marine insurance, recognizing not only the longer experience of those courts but also the great desirability of uniformity, given the close connections of the American and British insurance markets. *Gilmore & Black, The Law of Admiralty*, 50 (1957). The marine policy in common use in the United States is largely a transcript from the policy formerly adopted by Lloyds of London, foremost marine underwriters. 1 *Richards on Insurance*, § 18 (5th ed., 1952). *See also: Winter on Marine Insurance*, 139 (3rd ed., 1952). Because there are "special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business," *Queen Ins. Co.* v. *Globe & Rutgers F. Ins. Co.*, 263 U. S. 487, 493 (1924), divergence as to marine insurance law between decisions of the courts of the United States and of England has been repeatedly recognized by this Court as a reason for granting a writ of certiorari. 4 *Benedict on Admiralty*, § 391 (6th ed., 1940). See: *Aetna Ins. Co.* v. *United Fruit Co.*, 304 U. S. 430, 434 (1937); *Standard*

Oil Co. v. *United States*, 340 U. S. 54, 56-57 (1950). The reason for granting a writ should be even more compelling where, as in the cases herein, the divergence of the Court of Appeals is in the face of stipulations in the insurance contracts (R. 75, 83), which the District Court (R. 224-226, 279-280) and the Court of Appeals (Op. 9a) have found to be valid and binding, which state that liability for and settlement of any and all claims are to be determined according to "English Law and usage."

The areas in which the Court of Appeals has not applied or misapplied "English Law and usage" will be pointed up where applicable to each of Insurers' legal defenses that are in issue.

A. Did petitioners conceal circumstances material to the risk?

The Court of Appeals has dismissed as "stilted language" (Op. 11a) the controlling language of Lord Mansfield in *Carter* v. *Boehm*, (1766) 3 Burr 1905, 97 E. R. 1162, which reads:

> "The insured need not mention what the underwriter ought to know; *what he takes upon himself the knowledge of*; or what he waives being informed of." (3 Burr 1910; emphasis added)

In Bates v. *Hewitt*, (1897) L. R. 2 Q. B. 595, Mellor, *J.*, after quoting the above passage, states at page 609:

> "So far as I know, the judgment of Lord Mansfield has never been qualified or questioned."

Accord: *Greenhill* v. *Federal Ins., Co.*, (1927) 1 K. B. 65, 86 ("classical passage"); *Eldridge on Marine Policies*, 20-21 (3rd ed., 1938) ("the leading case" on the subject of waiver).

Insurers, petitioners say, took upon themselves the knowledge of the PACIFIC QUEEN by requiring a condition survey

before granting insurance. By virtue of the 1957 Elkins survey, which set the stage for the issuance of the insurance contracts in question, owners had every reason, under English Law and usage, to be satisfied that the vessel was seaworthy. *Frangos and Others* v. *Sun Insurance Office, Ltd.*, (1934) 49 Ll. L. Rep. 354, 358. The law is not otherwise in the United States. *Compania de Navegacion* v. *Firemen's Fund Ins. Co.*, 277 U. S. 66 (1928); case below—19 F. 2d 493, 495 (insurers made own survey and "thereby waived the implied warranty of seaworthiness"), reversed on grounds not pertinent herein.

Insurers *knew* gas in bulk was to be carried *below deck* (R. 780, 783-786; Marquat Survey—Pltffs.' Exh. 16;[1] R. 630). Under English Law, such knowledge was sufficient notice to Insurers of the nature of the risk involved. *Mann, MacNeal and Steeves* v. *Capital and Counties Insurance Co.*, (1921) 2 K. B. 300, 306 (petrol carried in *tanks* in engine room sufficient notice); approved in *Krelinger and Fernau, Ltd.* v. *Irish National Insurance Co., Ltd.*, (1956) Ir. R. 116 (underwriter sufficiently informed to be put on inquiry as to the details).

Of the two cases pertaining to surveys stressed by the Court of Appeals (Op. 14a-15a), one is not an English decision and neither is an insurance case.

B. Was the *Pacific Queen*, with the privity of petitioners, sent to sea in an unseaworthy condition?

Insurers' defense resting on alleged unseaworthiness existing prior to the Friday Harbor spill of gasoline was waived, as has been pointed out under sub-topic "A" hereof, by Insurers' condition survey of PACIFIC QUEEN for insurance purposes which was conducted and reported by Elkins in May of 1957. The "privity" issue, then, is only relevant to PACIFIC QUEEN's movements subsequent to the spill.

The Court of Appeals (Op. 18a); as did the District Court, has failed to apply the latest English decision, *Cia Naviera Vascongada* v. *British & Foreign Marine Insurance*

[1] Offered R. 348; received R. 351.

Co., Ltd., (1936) 54 Ll. L. Rep. 35, explaining the import of the word "privity" in Section 39(5) of the British *Marine Insurance Act*, 1906. In the *Vascongada* case, which, as herein, involved a time insurance policy, it is stated at page 58:

> "I think that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy and *deliberately* refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness of his ship. But the *mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precaution might have disclosed.*" (Emphasis added.)

Insurers have never alleged, nor has any court finding been made, that Mardesich (manager and part-owner) or Jasprica (Chief Engineer and part-owner) *deliberately* refrained from an examination of PACIFIC QUEEN after the spill which might have revealed that gasoline "must have soaked and impregnated large parts of the wooden area of the ship" (R. 241). Nor can it be found, under English Law, that the omission to take precautions beyond washing down the affected areas and the employment of blowers and a bilge solvent made the owners privy to any unseaworthiness which any additional precaution might have disclosed.

The *Vascongada* case expresses sound English Law and is founded upon extensive precedent. *Pac. Coast Coal Freighters Ltd. v. Westchester Fire Ins. Co.*, (1926) D. L. R. 963 (Marine Insurance Act "privity" section "a codification of the law as it stood at the time"); *British and Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.*, (1916) 1 A. C. 650, 673 (existing law can only be altered by codifying Act by indisputable language); *Thomas* v. *Tyne and Wear Steamship Freight Insurance Association*, (1917) 1 K. B. 938, 940-941 ("misconduct" necessary); followed in *Cohen* v. *Standard Mar. Ins. Co.*, (1925) 30 Com. Cas. 139, 159.

C. Did the loss and damage to the *Pacific Queen* result from want of due diligence by petitioners?

The PACIFIC QUEEN, as a result of damage to her hull planking caused by the explosion, "ultimately settled on the bottom with a ten degree list" (Op. 7a). According to the Coast Guard findings, which were adopted by the District Court (R. 255), "inrushing sea water" (R. 1082) contributed to the loss of PACIFIC QUEEN which "sank at the dock in approximately 30 feet of water" (R. 1051). The Court of Appeals, nevertheless, stated that "it was proper for the district court to attribute the PACIFIC QUEEN's loss to a gasoline explosion, even if another peril or combination of perils *could* have been a concurrent cause" (Op. 21a).

The law does not play an unreal, metaphysical game of trying to find a single isolatable factor as the sole responsibility to which is to be attributed a loss against which insurance has been bought; as a matter of experience and reason such losses are invariably the resultant of a combination of factors. *Standard Oil Co.* v. *United States*, 340 U. S. 54, 66 (1950) (dissenting opinion). English marine insurance law searches for the *dominant* cause only when there is a pertinent exception to coverage in the policy language. *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society*, (1918) A. C. 350, 363, affirming the case below. In the case below, reported at (1917) 1 K. B. 873, it is stated at page 883:

> "Where, in the case of a vessel at sea, sea water flows into her through an opening in such quantities that the vessel sinks and is lost, that is a loss through a peril of the sea. If the opening were made by a hostile shell or torpedo, and in consequence the vessel fills and sinks, the loss would still be by a peril of the sea * * *."

and at page 887:

> "Another class of cases consists of those in which the policy contains no warranty or exception material to

be considered, and where, therefore, the only question is whether upon the facts it can be said that the loss was covered by the contract. To this class of case the language of Willes J. in *Grill* v. *General Iron Screw Collier Co.*, (1866) L. R. 1 C. P. 600, 611, directly applies. He says: 'A policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea: *the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract.*'" (Emphasis added.)

Cf. Board of Trade v. *Hain S. S. Co.*, (1929) A. C. 534, 539; *Dudgeon* v. *Pembroke*, (1877) 2 App. Cas. 284, 297; followed in *Frangos and Others* v. *Sun Insurance Office, Ltd.*, (1934) 49 Ll. L. Rep. 354, 359; *Reischer* v. *Borwick*, (1894) 2 K. B. 548, 551; *Ashworth* v. *General Accident Fire and Life Assurance Corporation*, (1955) Ir. R. 268, 300 (dissent on other grounds).

The insurance policies (R. 71, 74) cover perils "* * * of the Seas, Fire, * * * and all other like Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, etc., or any part thereof: * * *." By reason of there necessarily having been some form of "ignition" prior to the explosion, there was additional coverage under the "Fire" and/or "like Perils" coverage. *West India Telegraph Company* v. *Home and Colonial Insurance Company*, (1880) 6 Q. B. Div. 51; *Thames and Mersey Insurance Company* v. *Hamilton Fraser & Co.*, (1887) 12 App. Cas. 484, 495 ("operative words"), 500 ("fire" may be extended to similar risks by the general words); *cf. Southport Fisheries* v. *Saskatchewan Gov. Ins. Office*, 161 F. Supp. 81 (D. C. N. C., 1958); *Feinberg* v. *Insurance Company of North America*, 260 F. 2d 523 (1st Cir., 1958). Any ambiguities as to the extent of coverage under the contracts are, in any event, to be resolved in favor of assureds.

II

The Court of Appeals decision upholding the District Court's denial of jury trial sanctions a departure from the accepted and usual course of judicial proceedings.

Most of the facts concerning petitioners' strivings for jury trial are set out in the Court of Appeals' opinion as modified (Op. 25a-30a). The Court of Appeals erred, however, in considering that the right to jury trial in the Superior Court for the State of Washington had not been perfected in the *Symes* case before it was removed on consent and consolidated with the *Atlas* case in the federal District Court. The affidavit of the Honorable Bertil E. Johnson, acting judge of the Superior Court of the State of Washington (in and for Pierce County), part of the supplemental record filed with the Court of Appeals, clearly states that such right was perfected. Plaintiffs' Note of Issue demanding jury trial was indeed *filed* in the Superior Court—but mistakenly under the caption of the *Atlas* case which was then in the Federal District Court. Respondents' counsel recognized the oversight as "inadvertence" and the oversight was cured in open court. (See Transcript of Proceedings attached to Judge Bertil's affidavit sworn to on April 5, 1962.)

Where the pleadings in a State court expressly demand a jury to try the issues, and there is no express waiver of the right so demanded, the Federal Rules of Civil Procedure do not require another demand in the court to which the proceeding is removed. *Wardrep* v. *New York Life Ins. Co.*, 1 F. R. D. 175 (D. C. Penn., 1940). *Cf. Angel* v. *McLellan Stores Co.*, 27 F. Supp. 893 (D. C. Tenn. 1939). In *Rehrer* v. *Service Trucking Co.*, 15 F. R. D. 113 (D. C. Del., 1953), decided under Rule 81(c) of the Fed. Rules Civ. Proc., 28 U. S. C. A., the court stated at page 113:

> "Plaintiffs clearly demonstrated a desire for trial by jury. This they did by an affirmative demand for it.

> not by silence in the state court. No plausible reason is apparent to me why a second request is necessary or why a waiver of jury trial should be imputed after removal to a party who positively demanded it just prior to removal. Barron and Holtzoff, Federal Practice and Procedure, 1952 Supp., Sec. 132, p. 75."

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. *Jacob* v. *City of New York*, 315 U. S. 752, 752-753 (1941). This Court has long emphasized the importance of the jury trial. *Beacon Theatres* v. *Westover*, 359 U. S. 500 (1959) (Footnote 18). *Cf. Rogers* v. *Missouri P. R. Co.*, 352 U. S. 500, 509 (1917); *Dairy Queen* v. *Wood*, 369 U. S. 469 (1962). This Court should now again exercise its power of supervision of the Federal courts to consider petitioners' argument under Rule 81(c) of the Federal Rules of Civil Procedure in spite of its having been raised for the first time on the appeal to the Ninth Circuit Court of Appeals. As Mr. Justice Black said in *Hormel* v. *Helvering*, 312 U. S. 552 (1941), at page 557:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither passed upon by the court or administrative agency below: See Blair v. Oesterlein Mach. Co., 275 U. S. 220, 225, 72 L. ed. 249, 252, 48 S. Ct. 87."

Cf. Shokuzan Shimabukuru v. *Higeyoshi Nagayama*, 140 F. 2d 13, 15 (D. C. Cir., 1944). A denial of jury trial, as it affects a constitutional right, should not be precluded from review at this or any stage of litigation.

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Conclusion

There have been surprisingly few cases litigated since World War I where substantive questions of marine insurance law were put in issue and decided. *Gilmore & Black, The Law of Admiralty*, 51 (1957). The PACIFIC QUEEN cases, commenced by petitioners, contain a broad spectrum of issues bearing on some of the most significant sections of the *Marine Insurance Act*, 1906, and upon landmark cases from which English marine insurance law and usage have been derived. The Court of Appeals decision, unsettling in so many ways, has put into doubt the value of thousands of outstanding marine insurance policies which are framed around the same time-tested language as contained in the PACIFIC QUEEN policies. If the Court of Appeals decision stands, insurance companies may employ its confused and erroneous principles to contest types of claims which, for centuries, have been honored, with a resultant increase in litigation in the Anglo-American marine insurance field. Also, the international prestige of American jurisprudence may well suffer if the Court of Appeals decision is permitted to unsettle the law of another leading maritime nation.

There are special and important reasons for the granting of a writ of certiorari and petitioners respectfully pray that such writ be issued.

Respectfully submitted.

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Opinion of United States Court of Appeals for the Ninth Circuit

Before:

POPE, BARNES and HAMLEY, *Circuit Judges*.

BARNES, *Circuit Judge*:

This is a consolidated appeal taken after trial in the United States District Court in which judgment was entered for appellee insurance companies holding them exonerated from liability on certain contracts of insurance. Appeal No. 17,460 was formerly No. 2348 in the district court and was originally filed in the Superior Court for the State of Washington from which it was removed to the district court only to be remanded back to the State court. Appeal No. 17,461 was formerly No. 2543 in the district court; it was originally filed in the Superior Court for the State of Washington from which it was removed to the district court and a motion to remand was denied. After removal of No. 17,461 to the district court, appellants stipulated the then State court case could be retransferred to the Federal court, and moved to consolidate No. 2348 with No. 2543. The motion was granted and the two cases consolidated for trial. Diversity of citizenship existing, and an amount in controversy exceeding $10,000, the district court had jurisdiction to hear the consolidated cases under the provisions of Sections 1332 and 1441(a) of Title 28, United States Code.

Judgment for appellees in both cases was entered March 23, 1961. Timely notice of appeal was filed. This court has jurisdiction to review the judgment entered below under the provisions of Sections 1291 and 1294(1) of Title 28, United States Code.

Both actions were brought by appellants to recover from appellee insurance underwriters on contracts for marine insurance for loss and damage resulting from the total constructive loss of appellants' diesel powered fishing vessel, the

Pacific Queen, owned by Pacific Queen Fisheries, a partnership.[1]

The Pacific Queen was built in 1943 for the Navy. The vessel had a wooden hull and structure with steel decks and deckhouse; she was 988 gross tons, 672 net tons, 173 feet in length, 37 feet in width, 18.8 feet in depth, and propelled by 1600 HP twin-screw diesel engines. Built for Navy salvage operations, she had been outfitted with two 1500 gallon gasoline tanks which were equipped with "a very safe" aqua or hydraulic system which dispensed gasoline by injecting water through interior piping into the tanks (thus forcing the gasoline of lighter specific gravity to rise) thereby transferring the gasoline through permanent piping to pumps and discharge valves, *located above deck*.

In 1948 the Pacific Queen was bought as war surplus by an individual who resold her to a corporation then controlled by appellant Breskovich. The corporation then sold the vessel to appellants, or their predecessors in interest.

The Pacific Queen became a total constructive loss on September 17, 1957 because of a violent explosion. Immediately thereafter, in the regular course of its official duties, the Coast Guard made a full investigation. The transcript of the Coast Guard's hearing, its detailed findings and conclusions, recommendations and official action, were offered into evidence by appellants and admitted *without objection*. The district court found the Coast Guard's findings and conclusions to be true and incorporated them by reference and adopted them into its own findings of fact.

Beginning in 1950, appellants operated the Pacific Queen between Puget Sound and Bristol Bay, Alaska, as a refrigerated vessel to freeze and transport catches of salmon from Alaska to ports on Puget Sound. In 1951 regulations which

[1] Hereinafter the term "appellants" will be used to describe all plaintiffs below (and appellants here) unless some special interest or issue requires a specific name to be used. Appellees (all underwriters of marine insurance for the Pacific Queen, defendants below) will be referred to as "appellees" unless a more specific designation is required.

prior thereto had prohibited power-driven fishing boats in Bristol Bay, as a fish conservation measure, were relaxed and power boats (*e.g.*, gillnetters) up to thirty-two feet in length were permitted. Many of the gillnetters are powered by gasoline; others are powered by diesel fuel. Both types of fuel may be obtained from various sources in Alaska.

During the years beginning 1950, appellants insured the vessel with various insurance companies, including some but not all of the respective appellees which insured her in 1954.

On various occasions between 1950 and 1957, before each year's fishing season began, appellants, through a broker,[2] requested that the vessel be surveyed by the Board of Marine Underwriters of San Francisco, or by United States Salvage Association. On other occasions during this period appellants requested through a broker, other well recognized and competent surveyors to survey the vessel. This was done in 1950 by Alexander Gow, Inc., and in 1953 by Captain Adrian Raynaud, but neither surveyor reported the existence of any gasoline or gasoline tank capacity aboard the Pacific Queen.[3]

On or about May 3, 1955, Hansen & Rowland, acting as broker for appellants, requested United States Salvage Association to make a condition survey of the Pacific Queen. One Edward Marquat, an experienced surveyor, since deceased, was assigned to the task. He made an exceptionally careful and meticulous survey. His condition report (six single-spaced pages) is dated May 13, 1955. With respect to gasoline, his report read in full text:

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[2] Appellants selected, from time to time, different brokers. See Finding of Fact VIII-D, R. 256.

[3] In 1949, pursuant to Coast Guard orders when the vessel was chartered to carry cargo to Hawaii, the Navy's aqua system for transporting and dispensing gasoline from the vessel's two aft gasoline tanks was blanked off and disconnected, and the two tanks were filled with water.

"Fuel and Water Capacities:

Fuel	49,000 gallons
Water	14,000 "
Gas	3,000 "

(Gasoline tanks under deck aft, proper filling lines and vents to atmosphere)."

The court found Pacific Queen Fisheries knew Marquat's report was the only information appellees had concerning gasoline "because, in 1956, appellant John Vilicich, one of the active partners [experienced in the marine insurance business] asked for and received a copy of the report."

The Pacific Queen did not engage in Alaskan operations in 1956. She remained in lay-up status. On about May 2, 1957, Hansen & Rowland, again acting as appellants' broker, requested United States Salvage Association to make a condition survey. Appellants particularly requested a survey of two newly purchased gillnetters and incidentally, of the Pacific Queen. J. E. Elkins, an experienced surveyor, made the survey. Elkins' only other survey of this vessel was made in 1949—at which time no gasoline was being carried by the vessel. His report (Exs. 359, 360), dated May 2, 1957, like those of Gow's (in 1950) and Raynaud's (in 1953), made no reference to gasoline tank capacity, nor to any bulk gasoline carried aboard the vessel. Elkins reported the vessel to be a mothership for gas-powered gillnetters. (Finding of Fact VIII. J., R. 258-259) [1]

At the time of the explosion on September 17, 1957, the gasoline tank capacity of the Pacific Queen had been increased from 3,000 to 8,000 gallons. This increased gasoline capacity was accomplished by filling two tanks, theretofore

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[1] Until 1951, the small "gill net" fishing boats used in Bristol Bay, Alaska fishing were powered by sail and oars. In 1951, power boats up to thirty-two feet in length were permitted to fish there under regulations of the United States Fish and Wildlife Service. Gasoline for use on such boats is obtainable in Alaska from various sources, "including tank vessels, scows, barges and shore facilities." (Finding VIII B, R. p. 255.)

used for diesel fuel, with 5,000 gallons of gasoline. Gasoline is a far more hazardous commodity than diesel oil to use or transport. Appellants inserted below deck exposed gasoline discharge valves into fittings that had been designed and used for insertion of permanently secured drainage plugs. These valve replacements were located in or near a passageway where ship's equipment, fishing gear and personnel frequently passed.

These alterations for discharging gasoline adapted by the Pacific Queen were apparently unique to her. Such a system or method of handling and discharging gasoline was not in common usage. It was not used on other vessels in which some of the Pacific Queen's owners had, and have, an interest. There was no positive evidence the same method had ever been used on other vessels.

The appellants accomplished this change in the vessel's gasoline tank capacity (*i.e.*, the increase of gasoline tank capacity from 3,000 to 8,000 gallons by means of the above described alterations) at some date subsequent to the May 13, 1955 Marquat condition survey, and prior to the attachment of insurance on May 24, 1957.

On May 27, 1957, the Pacific Queen departed from Seattle and proceeded to Alaskan water to engage in fishing. She commenced her adventure with the increased gasoline tank capacity and the changed method of piping, valving and internal method of discharge of gasoline above known to her owners and manager.

After the Pacific Queen returned from Alaska, she shifted to various Puget Sound docks, and with her increased gasoline tank capacity and changed method of piping, valving and internal method of discharge of gasoline as hereinabove described, and with the knowledge of her owners and manager, she then was sent from Seattle to Friday Harbor.

While the Pacific Queen was at Friday Harbor, she had on board approximately 2,000 gallons of gasoline. On September 9, 1957, while at Friday Harbor, 500 to 600 gallons of gasoline were spilled from one of the vessel's tanks in

its hold into the interior of the vessel. While appellants minimized the seriousness of this spillage, the court below believed it was a serious incident. It created great hazards to the ship, life and property. Gasoline from the spillage soaked and impregnated large parts of the wooden hull and structure of the vessel. It was not a sudden spill. It began early in the evening preceding its discovery at 4:00 a.m. by the cook. It lasted at least six hours, probably longer. In the course of the spillage, liquid gasoline and gasoline fumes permeated the lower after portion of the vessel.

The spillage was reported to one of the appellant-owners and manager of the vessel (appellant Mardesich) while he was in Friday Harbor on September 9, 1957. He inspected the vessel but gave no specific orders as to the methods to be used in cleaning her. He did not order any chemical tests to be made to determine if she was gas-free; he did not order the plugging-up of the valves on the other gasoline tanks to prevent similar spills. Nor did he order the discharge of the remaining gasoline from the other tanks.

In an attempt to purge the vessel of gasoline, cold water, sprayed through a hose, was used to wash down the area. After removal of all visible traces of gasoline, the area was again washed down with cold water, and a bilge cleaning solvent was used in an attempt to remove the gasoline from the wooden hull. Portable blowers were used to remove gasoline fumes from the vessel. Then, on the evening of September 10, 1957, the vessel's ventilation blowers were placed into operation to free the vessel from gasoline fumes.

The district court—basing its findings on expert testimony—found the steps taken to purge the vessel of gasoline and gasoline fumes to be inadequate. After the Friday Harbor spill and with the knowledge of the vessel's owners and manager, a plug was put into the valve on *one* of the tanks but no precautions were taken to prevent similar spills from the remaining three tanks. The court found: "All of the plaintiffs' [appellants'] witnesses, including two of the part-owners, who were experienced in the handling of gasoline,

agreed that this was a serious want of due diligence." All of appellees' witnesses agreed that it was extraordinarily hazardous to permit a vessel to be in such condition, or to send the vessel to sea in such a condition, and that it might take a period of weeks before the vessel was sufficiently gas free to operate with safety.

On the evening of September 11, 1957, the Pacific Queen departed from Friday Harbor and proceeded to Seattle. On September 15, 1957, she left Seattle and proceeded to Tacoma where she tied up at "Old Town Dock" at approximately 4:35 p.m.

At approximately 4:00 a.m. on the morning of September 17, 1957, a violent explosion occurred on board the Pacific Queen. Portions of the vessel were hurled several hundred yards away, plate glass windows in the surrounding area were broken, and a distinct blast from the explosion was felt some two miles distant. Witnesses living a few hundred feet from the explosion, who were immediately awakened and could observe it, reported a ball of orange fire and a black smoke present at the time of the explosion—color characteristics consistent only with an explosion of gasoline vapor origin.

The explosion ripped open the vessel's hull planking on the port after side of the engineroom at the turn of the bilge and a large section of the vessel's main deck aft of the superstructure (together with brine tanks, hatches manhole covers, a gillnet boat, etc.) was blown off, and into the water. A fire *followed*, and the Pacific Queen ultimately settled on the bottom with a ten degree list to the starboard. The source of the explosion's ignition is unknown. It could have been a spark from a cigarette, or a match, or an electric contact, or other accidental source. But, by an "overwhelming preponderance of the evidence," the district court found the constructive total loss of the Pacific Queen was the result of a gasoline explosion.

The district court, sitting without a jury, held appellees free from liability on contracts for insurance against loss

on the Pacific Queen—in the total amount of $325,000—which each of the appellees, in varying amounts, had underwritten. From a judgment so holding, appellants take this appeal.

Appellants' opening brief does not specify wherein the findings of fact and conclusions of law are alleged to be erroneous.[5] After having this discrepancy pointed up by appellees in their answering brief, appellants set forth their forty-eight specifications of error in the appendix to their reply brief. Of these, Numbers 1, 3, 14 and 47 have been waived or abandoned.

The principal questions here presented by the forty-four errors specified are whether the district court was clearly erroneous in finding:

1. That appellants concealed from appellees circumstances material to the risk.

2. That the Pacific Queen was, with the privity of appellants, sent to sea in an unseaworthy condition.

3. That the loss and damage to the Pacific Queen resulted from a want of due diligence by the vessel's appellant-owners.

4. That appellants breached their implied warranty that the Pacific Queen's adventure was a lawful one and that, so far as appellants were able to control the matter, the adventure was to be carried out in a lawful manner.

Collateral questions presented are whether the district court was clearly erroneous in holding:

5. That a contractual time bar raised by one appellee was an effective bar to appellants' action.

6. That certain appellants were partners in the Pacific Queen Fisheries.

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[5] As is required by Rule 18(2)(d) of this court, and which this court has repeatedly held must be observed. *E.g., Thys Co.* v. *Anglo California National Bank*, 1955, 219 F. 2d 131.

7. That appellants had not perfected their right to jury trial.

Several preliminary observations should be made. First, in accordance with the intent of the parties as set forth in the certificate of insurance covering the hull,[6] as stipulated by both parties on brief, and as found and held by the district court,[7] English Law and usage governs the substantive law of the instant case. Secondly, it is not incumbent upon *appellees* to persuade this court that the district court's findings of fact are correct; on the contrary, the *appellants* must persuade this court that the district court's findings of fact are, as specified by appellants, clearly erroneous.[8] Third, this court must view the evidence in the light most favorable to the party who prevailed below; such a party must be given the benefit of all inferences that may reasonably be drawn from the evidence. The findings of the trial court sitting without a jury must be accepted unless they are clearly erroneous; they cannot be upset if they are supported by substantial evidence.[9]

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[6] Which reads:

> "(c) Warranted to be subject to English Law and usage as to liability for and settlement of any and all claims."

[7] R. 224-226, 279-280.

[8] Appellants' misconception is implied in the following language at page 5 of their reply brief:

> "[Appellees], instead of endeavoring to persuade this Court that *Pacific Queen's* explosion was fueled by gasoline, have merely adopted the Findings of Fact of the District Court on this and all factual questions in the case . . . Apparently they are under the mistaken impression that Fed. R. Civ. P. No. 52 (a) will pull the laboring oar for them . . ."

[9] *Sherman* v. *Lawless*, 9 Cir., 1962, 298 F.2d 899. See also, *Hudson* v. *Wylie*, 9 Cir. 1957, 242 F.2d 435; *cert. den.* 355 U.S. 828; *Lewis Food Co. of Cal.* v. *Milwaukee Insurance Co.*, 9 Cir. 1958, 257 F.2d 525; *Stacher* v. *United States*, 9 Cir. 1958, 258 F.2d 112, *cert. den.* 358 U.S. 907.

I

DID APPELLANTS CONCEAL CIRCUMSTANCES MATERIAL TO THE RISK?

Was the district court clearly erroneous in finding—and holding accordingly—that the insurance was void *ab initio* because appellants failed to disclose material increases in the risk caused by the increased gasoline carrying capacity of the Pacific Queen and the extra-hazardous method of carriage of that increased amount of gasoline? We hold it was not.

The district court made careful and voluminous findings.[10]

The Marine Insurance Act, 1906,[11] in part here pertinent, provides:

> "17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.
>
> * * *
>
> "18.—(1) . . . the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
>
> "(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

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[10] * * *

[11] 6Edw. 7, C. 41. This Act is referred to in appellees' brief as appearing in 2 Arnould, Marine Insurance (1954) 1180 ff. Arnould's 15th Edition (1961) takes the new title of "British Shipping Laws—Vols. 9 & 10." The Marine Insurance Act, 1906, appears at 1261 ff.

Appellants contend that they were not under a duty to disclose the increased gasoline tank capacity of their vessel, or the below-deck alterations made to dispense gasoline because (a) appellees must be presumed to have had notice of the changes, even though they might not have had actual notice, and (b) appellees waived disclosure of the changes.

Section 18(3) of the Marine Insurance Act, 1906, provides the following exceptions to the duty to disclose:

> "In the absence of inquiry the following circumstances need not be disclosed, namely:
>
> * * *
>
> "(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
>
> "(c) Any circumstances as to which information is waived by the insurer. . . ."

These exceptions to the duty of disclosure are discussed in 2 Arnould on Marine Insurance, 15th Ed. (1961), §§ 621-631. After quoting the stilted language of Lord Mansfield in *Carter* v. *Boehm*, (1766) 3 Burr. 1905, it is there said, on the question of what is presumed to be known to the insurer, that:

> "[A]n insurer is presumed to know that it is impossible to make a floating dry-dock as seaworthy as an ordinary ocean-going craft, and is put on inquiry, if he admits seaworthiness as to the means adopted to strengthen it.
>
> "A knowledge of the political state of the world, of the allegiance of particular countries, of their standing mercantile regulations, of the risk and embarrassment affecting the course of trade contemplated by the insurance, must all necessarily be imputed to the Underwriter, and therefore, need not be disclosed by the assured. . . ." (Arnould, *supra*, § 622.)

And, on the question of what ought to be known to an insurer, Arnould states:

> "On the principle that the assured need not disclose what the Underwriter ought to know, it has been decided in several cases that facts comprised in the general usages of the trade need not be communicated to the Underwriter; . . . But to dispense with communication of anything done according to usage, *such usage must be generally and universally known to all engaged in the trade.*" (Arnould, *supra*, § 623.) (Emphasis added.) Citing *Tennant* v. *Henderson*, (1813) 1 Dow 324.

The Marine Insurance Act, 1906, Section 18 provides with respect to disclosure:

> "* * * *
>
> "(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact."

The district court here found as a fact (a fact appellants seemingly do not controvert) that the altered method of handling gasoline was not a usage "generally and universally known to all engaged in the trade," but, on the contrary, found that it was unique—it was "not in common usage, but was exclusive to the Pacific Queen." Elkins, when making his 1957 survey, had only known the Pacific Queen as a vessel not carrying gasoline. Elkins reported her to be a mothership for gas-operated gillnetters. But, as the district court found, this gave no notice that the Pacific Queen was carrying bulk gasoline, because gasoline and other types of fuel were, and are, available from various sources in Alaska other than the mothership. Appellants' reliance on the exception to require disclosure based upon usage is misplaced.

As to the exception to the duty of disclosure based on waiver, Arnould states:

> "It was . . . held by the Court of Appeals [in *Mann, MacNeal & Steeves* v. *Capital & Counties Ins. Co.*] that information that the cargo was of a hazardous character had been waived. Bankes L.J. said that an Underwriter waives any information in relation to what may be fairly described as a parcel or ordinary cargo of lawful merchandise, and also, quoting Lord Esher M.R. in *Asfar* v. *Blundell* that the rule *is satisfied if the assured discloses sufficient to call the attention of the Underwriters so that they can see if they require further information, they ought to ask for it. . . .*" (Arnould, *supra*, § 631.) (Emphasis added.)

And further:

> "Atkins, L.J. with whose judgment on this point Younger, L.J. agreed, said that included in the risk an Underwriter takes is the risk that there is an already concluded engagement for hazardous cargo, just as there is the countervailing possibility he runs no risk of a hazardous cargo at all, by reason of an absolutely safe cargo having been agreed." (*Id.*)

Appellants place great reliance upon *Mann, MacNeal & Steeves* v. *Capital & Counties Ins. Co.* (1921) 2 KB 300 the case cited and discussed by Arnould in § 631, *supra*. In *Mann* no absolute rule as to disclosure was established. The disclosure of the nature of the cargo (even when it is iron drums of gasoline, as it was there) is waived where there is proof the cargo "is an ordinary and common form of merchandise" (p. 306) which can be carried as safely as the common run of cargo. "The question whether disclosure must be made or not is one of degree, depending upon the circumstances of each particular case" (307). But appellants do not explain the above italicized language in the quotation from Arnould, *supra*, § 631. Further the failure to disclose here relates to a *part of the ship*—the altered method of handling gasoline; not to the *cargo* itself.

Appellants next contend that appellees waived disclosure of the increased gasoline tank capacity and the altered methods of gasoline discharge because surveys had been made. But the district court found that appellants did not disclose the altered method of handling gasoline to the surveyors; that the surveyors did not know of these alterations; that the altered methods were exclusive to the Pacific Queen; that they were not common usage; and that to make such alterations was a simple job that would take two men thirty minutes to perform. Further, the district court found that the alterations were not observable by reasonable inspection.

Appellants were under a duty to advise the surveyors of alterations requiring especial examination. This court has previously so held. In *States Steamship Company* v. *United States*, 1958, 259 F. 2d 458 at 469, we said:

> "Marine Surveyor Wilson who then inspected the ship for the American Bureau of Shipping testified that he received no special information concerning the vessel prior to his survey and he knew nothing outstanding against it. The record warranted the court's evident conclusion that an inspection of a vessel known to have a history of crack sensitiveness and particularly a history of a Class I fracture, should be much more careful and elaborate than this vessel ever had. The company itself was chargeable with knowledge of the pending inspection and yet it failed through Vallet or Brenneke [its port engineer, and its manager, respectively] or any other person to inform the inspectors of these special conditions attending the ship. In the words used in The Silver Palm [9 Cir., 94 F.2d 776], all these circumstances made the more imperative the obligation of the owner and operator to advise of the special circumstances calling for a special inspection and a more thorough one than had been made." [12]

[12] And see cases we cited in that decision: *The Silver Palm*, 9 Cir., 94 F.2d 776; *Spencer Kellog & Sons* v. *Hicks*, 285 U.S. 502.

That appellants were here under a duty to disclose is also shown in the holding of the British case of *The Assunzione*, (1956) 2 Lloyd's List Law Rep. 468, where, at 486, Mr. Justice Willmer (in quoting the expert Rolland and in discussing the value of a survey made by the owners themselves, and not one made by a classification surveyor) said:

> "A prudent shipowner has a superintendent whose duty it is in the first instance to go around the vessel finding out the defects, and pointing them out to the Classification Surveyor. A superintendent does not rely on the Classification Surveyor to point out the defects—at least it is not good practice to do so. The superintendent and the Classification Surveyor should inspect together and deliberate on what should be done."

Appellants contend, in their reply brief, that the changes made on the Pacific Queen must have, or should have, been apparent to Elkins. We cannot agree. As mentioned above, because the vessel was engaged in Bristol Bay operations did not mean it *had* to be carrying gasoline. And appellants' gesture of requesting a survey on an unlighted dead vessel, which survey was related to a request to look at two new gillnetters, and only incidentally, to "look over" the vessel; plus (a) appellants' failure to point out hazards or (b) advise Elkins of intended changes, and (c) their failure to have one of the owners who was chief engineer identify himself, and (d) the failure to inform their brokers of present or intended changes, do not meet the good faith and fair disclosure requirements of the Marine Insurance Act. Nor can it lead us to believe that the district court was clearly erroneous in finding that the changes were *not* necessarily apparent to Elkins.

Appellants further contend, in their reply brief, that the quantity of gasoline carried was immaterial from a risk standpoint because only two gallons of gasoline (according

to appellees' expert) was all that was needed to fuel an explosion of the magnitude of that which destroyed the Pacific Queen. The quantity carried may or may not be material; the manner in which the gasoline was carried and handled is material. If only two gallons of gasoline were needed to do that which was done, then an extra-hazardous system such as was here adopted by appellants makes the change all the more material; and indicates the correctness and reasonableness of the district court's finding that appellees would not have insured the vessel if appellants or their brokers (who were also kept in the dark) had disclosed all or any of the several material increases in the risk.

Appellants also contend many of the cases cited by appellees on this issue are inapposite. But they still rely on the *Mann* case, *supra*, and make no reply to Arnould's commentaries, nor to the language of the Marine Insurance Act itself.

Viewing the evidence as this court must, we agree with the district court's holding that the insurance never attached and was void *ab initio* for failure to disclose material increases in the risk. Such a holding was not clearly erroneous; nor was it without substantial evidence in the record to support it.

II

WAS THE PACIFIC QUEEN, WITH THE PRIVITY OF APPELLANTS, SENT TO SEA IN AN UNSEAWORTHY CONDITION?

The next question is whether the district court's finding that the Pacific Queen, with the privity of appellant-owners, was sent to sea in an unseaworthy condition is clear error. Again, we cannot hold the district court's finding was clearly erroneous.[13]

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[13] * * *

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[13] * * *

The correct and most concise statement of what is meant by "privity" is set forth in *M. Thomas & Son Shipping Co. v. The London & Provincial Mar. Ins. Co.*, (1914) 30 T.L.R. 595 (C.A.). There, at page 596, the court said:

> "[W]ords in s. 39, subs 5, of the Marine Insurance Act, 1906, 'Where with the privity of the assured a ship is sent to sea in an unseaworthy state,' meant where 'the owner was privy to the state of things which in fact rendered the ship unseaworthy.'"

A reading of the facts as found by the district court clearly indicates that, within this definition, each time the Pacific Queen was sent to sea from and after May 24, 1957, until her loss, she was in an unseaworthy state, to the knowledge and in the privity of the assured owner. This because of the knowledge of its condition resting in one or more of the partners, and the manager (also a partner). The facts substantiate the district court's finding that said unseaworthiness was a proximate cause of the vessel's loss.

III

DID THE LOSS AND DAMAGE TO THE PACIFIC QUEEN RESULT FROM WANT OF DUE DILIGENCE BY APPELLANTS?

Appellants contend the district court erred in holding that they were precluded from recovering the loss of the Pacific Queen under the broader coverage of the Inchmaree clause contained in the contract of insurance here in issue.

Appellants represent that the Inchmaree clause was introduced to extend or broaden coverage and liability of underwriters; that the Inchmaree clause broadens coverage to include a variety of risks not embraced in the general perils

of the sea clause. Appellees do not quarrel with this opinion.[16]

The Inchmaree clause reads:

> "This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery directly caused by the following:—
>
> Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel.
>
> Explosions on shipboard or elsewhere.
>
> Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part).
>
> Negligence of Master, Mariners, Engineers or Pilots.
>
> [P]rovided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.
>
> Masters, Mates, Engineers, Pilot or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the vessel."

Appellants assume, *arguendo*, on this issue that they were negligent. But, they contend, the Inchmaree clause includes this risk and, therefore, appellees should be liable for the loss and damage to the Pacific Queen. The cases here cited by appellants largely relate to other circumstances and law; *e.g.*, most deal with section 39(5) unseaworthiness questions.

On this issue the district court found the loss was caused by a gasoline explosion.[17]

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[16] An example of the broader coverage is shown in the instant case. The general perils clause does include "fire" but does not include "explosion." Arnould, *supra*, § 819, citing *Thames & Mersey Mar. Ins. Co. v. Hamilton*, [1887] 12 App. Cas. 484. But the Inchmaree clause, by its very terms, includes loss by "explosion." Hence, appellants urge coverage under the Inchmaree clause.

[17] * * *

Appellants contend that the district court's finding that the loss of the Pacific Queen was due to a gasoline explosion was clearly erroneous. With this contention we cannot agree. A logical inference from the facts before the trial court clearly allows such a conclusion.[18]

The district court's findings of want of due diligence on the part of appellant-owners, and of a gasoline explosion are neither clearly erroneous, nor without substantial evidence to support them, seems clear. As stated by Arnould, *supra*, at page 764 (cited by appellants in their reply brief):

> "It is clear that a loss may be proximately caused by more than one peril, that is by a combination of causes, and in this event the loss can be properly attributed to any one of such causes."

We believe, therefore, it was proper for the district court to attribute the Pacific Queen's loss to a gasoline explosion, even if another peril or combination of perils *could* have been a concurrent cause.

IV

DID APPELLANTS BREACH THE IMPLIED WARRANTY THAT THE ADVENTURE WOULD BE LAWFUL AND, TO THE EXTENT THEY COULD CONTROL THE MATTER, THAT THE ADVENTURE WAS TO BE CARRIED OUT IN A LAWFUL MANNER?

The district court found appellants guilty of such a breach.[19]

The district court concluded (a) that the Tanker Act was applicable, (b) that the Pacific Queen's gasoline was supplied and used by others, and (c) that the gasoline trans-

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[18] We need only refer to the report in evidence, and the testimony of witnesses, that there was present at the moment of the explosion a large ball of orange fire, and of black smoke; characteristics consistent only with an explosion of gasoline vapor origin. And not consistent, as conceded by appellants' expert, with an explosion of ammonia origin (Finding of Fact XII, *supra*).

[19] * * *

ported by the Pacific Queen was not "fuel or stores", but was "cargo." The district court further concluded that such violation of the Tanker Act constituted negligence or want of due care and diligence on the part of the vessel's owners (independent of other findings of negligence and want of due diligence) but that this violation was not of such a character as to render the entire venture or voyage an illegal one. The court concluded that the hauling of the gasoline in bulk for the use described above was not the primary purpose of the voyage but merely an incident thereof.

We find the district court's findings and conclusions are detailed and well reasoned, but even were we to assume they were erroneous on this issue alone and were we to hold that appellants had not violated the Tanker Act[20] because its application as to them was vague and uncertain, this would not require a reversal of the case. With this in mind, we state the following:

We feel there exists a question, under the circumstances here presented, whether or not the bulk gasoline carried by the Pacific Queen could come within the term "fuel or stores." More importantly, other fishing vessels, performing a similar role as that played by the Pacific Queen, are (or very shortly will be) engaged in fishing adventures. Some carry bulk gasoline for the same purposes as those of the Pacific Queen. Many are insured, either by appellees or other underwriters. If a loss occurred, this case would be an important and perhaps controlling precedent. The Commandant of the Coast Guard said:

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[20] The Tanker Act (46 U.S.C. § 391a), in pertinent part, reads:

"All vessels, regardless of tonnage, size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, that shall have on board any inflammable or combustible liquid cargo in bulk, . . . shall be considered steam vessels for the purposes of title 52 of the Revised Statutes and shall be subject to the provisions thereof; *Provided*, That this section shall not apply to vessels having on board only inflammable or combustible liquid for use as fuel or stores. . . ."

"3. Since full compliance with either the regulations under the Tanker Act or the Dangerous Cargo Act, neither of which regulations were designed to cover this type of vessel and operation, which is presumably fishing, is impossible, or impracticable of accomplishment and further, since it is possible that the legal responsibilities of the owners of this type of vessel are not sufficiently clear, the file in this case will be referred to the Merchant Marine Council for study and action towards issuing such clarifying regulations as may be indicated."

Therefore, we prefer not to make an unnecessary decision on a non-controlling issue until the Merchant Marine Council (an expert body which can hold hearings and consider all ramifications of the question) has determined by regulation whether vessels of the Pacific Queen's type and operation should or should not be within the purview of the Tanker and Dangerous Cargo Acts.

V

COLLATERAL QUESTIONS.

A. Did the contractual limitation of action provision in the Buffalo Insurance Company policy bar appellants' action against Buffalo Insurance Company? We hold it did.

Conclusion of Law XI reads:

> "The Liability of defendant, Buffalo Insurance Company, is in any event barred by the time of suit clause.
>
> The policy of defendant, Buffalo Insurance Company (Pl. Ex. 1) provides in part:
>
> 'No suit or action on this Policy for the recovery of any claim shall be sustainable in any Court * * * unless commenced within *twelve months*

> next after the calendar date of *the happening of the physical loss* or damage out of which the said claim arose * * *." [Emphasis added by the trial judge.]

Since suit was not brought within one year, this claim is procedurally barred.

RCW 48.12.200 (1) (3)

Heffner v. Great American Ins. Co., 126 Wash. 390; 218 Pac. 206 (1923).

Hasset v. Penn. Fire Ins. Co., 150 Wash. 502, 273 Pac. 145 (1929)."

In reply to the authorities relied upon by the court, and the brief, and in an attempt to show error in the district court, appellants, at page 15 of their reply brief state:

> "Insurers have cited no English authority in the point and, therefore, *Phoenix Ins. Co. of Hartford* v. *De Monchy*, (1929) 45 T.L.R. 543, 35 Com.Cas. 67, quoted at page 51 of [appellants'] main brief, must be deemed conclusive and the Buffalo time bar provision must be disregarded."

Appellants rely heavily upon the *Phoenix* case involving turpentine that evaporated in transit. In that case, the policies contained the time clause limitation, but there was none in the certificate. It was held the certificate was the actual insurance, and the time clauses not contained in it could not be read into it (p. 544). The judgment was affirmed by the Lords. At page 544 it is stated:

> "It follows, I think, that all clauses of the policy which are essential to the contract of marine insurance must be read into the certificate, but beyond that there is no necessity to go. The condition in question is a collateral stipulation [a one year contractual time bar clause] imposing a condition precedent. It has

> nothing particular to do with insurance, but might be applied to any contract. Common sense and fairness revolt against the idea of this being enforced against the holder or indorsee of the certificate . . . [who could never have seen the policy]."[21]

The trial court in the *Phoenix* case had not held, as the district court did here, that the limitation clause was part of the actual contract between the parties. The appellate court there was affirming the court of appeals (31 Times L.R. 361). Had the lower court held there as the court did here, what would the appellant there have argued?

Having held the clause to be valid and an essential part of the contract entered into (for which there was ample support in law), we do not believe the district court's conclusion on this point was erroneous.

B. Was it proper for the district court to deny appellants a trial by jury? This is a matter within the discretion of the district court, and we conclude no abuse of said discretion is shown. However, because of the importance of this issue, we feel it must be discussed at some length. Our task is further enlarged by a complicated and confusing state of the record, and the manner in which this issue was presented to the trial court. We recognize that since "a right to trial by jury is a constitutional one . . . [the

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[21] The factual situation was, to say the least, unusual. Lord Atkin said:

> "The so-called policy is in fact misnamed. It does not insure anything, it neither defines the subject-matter insured, except that it is merchandise, principally . . . naval stores, nor the voyage insured, nor the sum insured. It is a promise during a certain time to issue policies to the named assured against named risks, but the completed policies named in the certificates are to be capable of varying the conditions of the policy, in accordance with written instructions given from time to time by the insurers. . . . The [limitation] clause is not one which binds the certificate holder." *Id.* at 549.

court's] discretion is very narrowly limited," and "must, wherever possible be exercised to preserve jury trial"[22]— yet the Rules of Civil Procedure mean something, and a limited judicial discretion must of necessity still exist.

The district court's "Memorandum Decision Re Applicable Law Jury Demand," at page 224 of the record, reads as follows:

> "It is indisputable on the record that plaintiffs' demand for jury trial was untimely by a substantial margin and that this constitutes jury waiver under F. R. Civ. P. 38(d). Although allowed ample time and opportunity therefore plaintiffs have not made a showing which amounts to excusable neglect, inadvertence or mistake or other basis on which the court in its discretion should order jury trial under F. R. Civ. P. 39(b). Plaintiffs' motion for jury trial is denied; exception allowed."

Finding of Fact No. III supports the above decision.

It is undisputed appellants never perfected a jury demand in the district court under the Federal Rules of Civil Procedure. There is dispute as to whether a jury demand was perfected in the State court. The right to jury trial in the State court is governed by RCW 4.44.100. This statute expressly requires that a statement electing jury trial be both served *and* filed *and* a jury fee paid. Unless such statement "is filed . . . the parties shall be deemed to have waived trial by jury and *consented* to a trial by court." (Emphasis added.)

The jury demand was never *filed*. Federal Rules of Civil Procedure, Rule 38(d) requires that a jury demand is filed,

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[22] *Beacon Theatres* v. *Westover* (1959), 359 U.S. 500, 510. As Mr. Justice Black, the author of the *Beacon Theatres* case decision, said with respect to its holding:

> "*Beacon Theatres* requires that any legal issue for which a trial by jury *is timely and properly demanded* be submitted to a jury." (Emphasis added.) *Dairy Queen* v. *Wood*, 369 U.S. 469.

and upon failure to do so, applies the penalty of a waiver of jury trial. Appellants now take the position they had established their *right* to a jury trial in the State court action. They state in their reply brief (p. 15):

> "Insurers caused to be inserted in the printed record certain material not in the record, and not in existence at the time of judgment, without leave of the court or notice to their adversaries."

This reference is to pages 51 to 53, inclusive, of the record, which contain an affidavit of appellees' counsel to which is attached a photostat of the Appearance Docket of some case pending in Pierce County, Washington, entitled "Mike Barovic (sic)[2] vs. L. Symes, et al." This photostat is described in the affidavit to which it was attached as "a certified copy of the Docket in case #37440 entitled Pacific Queen Fisheries, a partnership, et al., v. L. Symes." We assume that this is an accurate photostat of the Appearance Docket of the Pierce County Superior Court in one of the cases then before it and now before us (now No. 17460) on appeal.

When appellants urged the jury question in their opening brief (pp. 52-54), they took the position, unlike the one taken before the trial judge, that serving a demand for jury trial, and paying the required fee "completed the formalities required of a plaintiff for a right to trial by jury under the Rules of Procedure of the Superior Court for the State of Washington."

Appellees urged first that failure to file the demand for a jury trial waived or forfeited any right to it; and *secondly*, that the appellants in the federal courts (a) had neither filed a timely demand for a jury trial, and (b) had never urged that they had "completed all formalities" required by the State court, and hence had not acquired any "right" to a jury trial. The issue not having been raised below could

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[2] Mike Barovic, of course, here named as a plaintiff, was one plaintiff and a partner of Pacific Queen Fisheries.

not be raised on this appeal. In other words, appellants asked for a jury trial (under Rule 39(b)—discretion of trial judge), but never took the position they were entitled to it as a matter of right. They did not deny a technical waiver had occurred, merely that there had been "no conscious waiver." (Supp. Tr. of September 26, 1960, p. 45.)

To substantiate appellees' position, they filed in this court on March 29, 1962, a motion to augment the record, in the following particulars:

1. The Notice of Argument dated September 6, 1960.

2. The Notice of setting cause for trial.

3. Portions of defendant-appellees' Reply Brief, opposing jury trial, filed September 19, 1960.

4. Plaintiff-appellants' Memorandum in support of jury trial.

5. The Transcript of proceedings before the trial judge, had on September 26, 1960.

Appellants here had no objection to such augmentation—provided they were permitted to augment the record by an affidavit, made by the judge of the Washington State court to which was attached his rough calendar for November 21, 1960; and a reporter's transcript of the proceedings had before him on September 12, 1960. On that date the State court agreed to set the case for trial late in November. On September 12, 1960, Mr. Copeland, counsel for appellants, there questioned the judge: "I would assume about a four-day jury trial?" and Mr. Stephan, counsel for present appellees, stated: "I think it would be more like ten, if we have a jury. We have no jury in the federal court; the federal court is going to dispose of all of this matter."

There being no objection to the augmenting of the record, by either side, this court granted each side leave to augment.

Between the September 12, 1960 appearance and the November 21, 1960 "future setting" for a trial by jury, in the

State court, the federal court held a hearing on the matter. This was on September 26, 1960. On that date, Mr. Bow, appearing as counsel for appellants, moved the federal court "that we remove our State court case to this Court and consolidate the two for purpose of trial." This was agreed to by counsel for defendant-appellees and approved by the court. The litigants then presented authorities and arguments on that same date with respect to appellees' request for a jury trial. This was a 39(b) motion addressed to the sound discretion of the court. In their memorandum of law in support of such motion, Pacific Queen significantly conceded:

> "* * * plaintiffs may not have a jury trial as of right. However, this Court in its discretion may upon proper application grant an order placing the matter upon the Civil Jury Calendar. The authority for such an order lies in Rule 39(b) of the Federal Rules of Civil Procedure * * *. Plaintiffs have moved the court *for such an order* and submit this brief in support of their application." (Emphasis by appellants.) (Augmented Record, Item 4, pp. 1-2.)

As a result, the district court had no notice of the now claimed *right* to jury in the State court. At no time did appellants file a jury demand as required by Federal Rules of Civil Procedure 5(d) and 38(d). Appellants now raise an issue never raised in the trial court. Furthermore, it will be recalled that one case on this appeal (No. 17,461) had originally been filed in the State court and was removed to the district court which denied remand; the other case on this appeal (No. 17,460), originally filed in the State court, and afterwards removed to the Federal court, remanded back to the State court was then by motion and stipulation (see note 24, *infra*) returned to the Federal court and consolidated with No. 17,461. No timely jury demand was made in the "No. 17,461" case, then pending in the Federal court; appellants do not contend otherwise. With this in mind, the stipulation bears out the fact that the district

court neither committed error nor abused its discretion. Appellants entered into the significant stipulation, which appears in the margin,[24] with respect to the cases.

Under all the circumstances here appearing, we believe the district court properly consolidated the cases as non-jury cases. We hold there was no abuse of discretion.

C. Was the district court correct in holding appellants Hull, Peck and Royer to be partners in Pacific Queen Fisheries, and necessary parties whose admissions would be binding on appellant Pacific Queen? We hold it was. We think this is adequately demonstrated by a reading of Conclusion of Law X (R. 285-286).

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[24] The stipulation reads:

"1. That these causes shall be consolidated for trial, and that since the issues and contentions of the parties are the same or similar save and except as to the fact that suit is brought upon different policies of insurance, the pre-trial order heretofore entered in cause No. 2543 and any and all supplements or amendments thereto, shall be deemed and considered as applicable to and controlling upon the issues of this case except insofar as it shall be necessary during the course of the trial to indicate verbally or in writing that some such provision is not entirely applicable or that some additional proof or provision should be made other than contained in the pre trial order, it being the understanding and the purpose of this stipulation to avoid the necessity of the long and laborious work of another pre-trial order, it being the contemplation of the parties that there can be very little if any differences other than clerical or mechanical as the same may be made applicable to certain different documents that afford the basis for the insurance and that this stipulation is made for the convenience of counsel and the Court to avoid unnecessary paper work in the obtaining of a pre-trial order, but at the same time eliminate any excessive amount of trial work which would be eliminated by the pre-trial order but at the same time to not foreclose either party from the right or privilege of producing any evidence or making any contention which is necessary to the proper presentation of the party's case by reason of the fact that the pre-trial order is not separately prepared and is incorporated by reference to this stipulation."

However, appellants do not deem the point worthy of extensive discussion because "we know of no damaging 'admissions' made by any of these three men as referred to in the lower court's Finding of Fact X . . ." We do not consider that this point warrants further discussion. Thus, even if error, the error is harmless.

Finding no error, we *affirm* the judgment below for the reasons stated above.

(Endorsed) Opinion Filed Aug. 3, 1962.

Frank H. Schmid, Clerk.

Court of Appeals Judgments Sought to Be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17460

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

L. SYMES, *et al.*,

Appellees.

APPEAL from the United States District Court for the Western District of Washington, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and on motion of appellees to augment record and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the motion to augment record is granted, and that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this court in favor of the appellees and against the appellants.

It is further ordered and adjudged by this Court that the appellees recover against the appellants for their costs herein and have execution therefor.

Filed and entered August 3, 1962.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17461

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

ATLAS ASSURANCE COMPANY, *et al.*,

Appellees.

APPEAL from the United States District Court for the Western District of Washington, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this court in favor of the appellees and against the appellants.

It is further ordered and adjudged by this Court that the appellees recover against the appellants for their costs herein and have execution therefor.

Filed and entered August 3, 1962.

Pertinent Text of Constitutional Provision, Statute, Act, and Rules Involved

I

PROVISIONS PERTAINING TO PETITIONERS' ARGUMENT THAT COURT OF APPEALS DECISION DIVERGES FROM ENGLISH LAW AND USAGE

Marine Insurance Act, 1906, 6 Edw. 7, C. 41:

* * *

Section 17:

"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

* * *

Section 18:

"(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is pre-

sumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term 'circumstance' includes any communication made to, or information received by, the assured."

* * *

Section 39(5):

"In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

* * *

Section 55(2)(a):

"(2) In particular,—

(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew."

* * *

II

PROVISIONS PERTAINING TO PETITIONERS' ARGUMENT THAT THE COURT OF APPEALS DECISION UPHOLDING THE DISTRICT COURT'S DENIAL OF JURY TRIAL SANCTIONS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The *Seventh Amendment* to the *Constitution of the United States* (U. S. C. A. Constitution Amend., p. 379):

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

Federal Rules of Civil Procedure, 28 U. S. C. A.:

* * *

"Rule 38. Jury Trial of Right.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) SAME: SPECIFICATION OF ISSUES. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have de-

manded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

"Rule 39. Trial by Jury or by the Court.

(a) BY JURY. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) BY THE COURT. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) ADVISORY JURY AND TRIAL BY CONSENT. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

* * *

Rule 81(c):

"(c) REMOVED ACTIONS. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based; or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition."

Revised Code of Washington, § 4.44.100:

"JURY TRIAL FEE WAIVER. In all civil actions triable by a jury in the superior court any party to the action may, at or prior to the time the case is called to be set for trial, serve upon the opposite party or his attorney, and file with the clerk of the court a statement of himself, or attorney, that he elects to have such case tried by jury. At the time of filing such statement such party shall also deposit with the clerk of the court twelve dollars, which deposit, in the event that the case is settled out of court prior to the time that such case is called to be heard upon trial, shall be returned to such party by such clerk. Unless such statement is filed and such deposit made, the parties shall be deemed to have waived trial by jury, and consented to a trial by the court. PROVIDED, That, in the superior courts of counties of the first class such parties shall serve and file such statement, in manner herein provided, at any time not later than two days before the time the case is called to be set for trial. [1909 c 205 § 1; 1903 c 43 § 1; RRS § 316. FORMER PARTS OF SECTION: Code 1881 § 248 now in RCW 4.48.010.]"